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In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court denying the motion for a new trial (R. 116 ff.) is reported in 92 F. Supp. 750, (1950) (Appendix A hereto). The opinion of the Court of Appeals for the Ninth Circuit, and the dissenting opinion (R. 2204 ff.) are reported in 194 F. (2d) 80 (Adv. Sheets) (1952). The petition for rehearing and rehearing en banc was denied (R. 2226).

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1951 (R. 2225). The petition for rehearing and rehearing en banc was denied on January 23, 1952 (R. 2226). The petition for certiorari was filed on March 13, 1952. The jurisdiction of this court is invoked under under Title 28 USCA, Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED

Although petitioner has classified its questions in its petition in four paragraphs, there are in fact only two questions presented:

1. Whether the trial court correctly determined, as approved by the Court of Appeals, that the verdict of the jury was not motivated by passion or prejudice;

2. Whether the trial court, as approved by the Court of Appeals, correctly conceived its function in denying the motion for new trial.

STATEMENT

Dr. Edward H. Boice, the respondent herein, was raised in Texas, and took his pre-medical education at Rice Institute in Texas. He received his medical degree from the University of Texas Medical School in 1942, which he followed with a one year internship at Jefferson Davis Hospital, and was then admitted to practice medicine in Texas. Refusing several offers of hospital residencies, he volunteered for the United

States armed services, entering on active duty July 12, 1943.

Dr. Boice had an excellent army record and was separated from the service on October 19th, 1946, holding then the rank of major. During his Army career he was attached to various large hospitals of the Air Corps.

At the time of leaving the Army he was married and had two children. Desiring to settle in the Northwest he made an extensive trip through that section of the country to investigate possible locations, and shortly after his return to Texas, negotiations were commenced which culminated in his employment by petitioner as a company doctor at Stibnite, Idaho, a remote mining town wholly owned by petitioner (R 336, 353, 389, 553). He moved to Stibnite with his family and possessions and assumed his duties about March 1, 1947 (R 137-144). A large part of petitioner's statement of the facts is devoted to occurrences prior to May 13, 1948, as was also several weeks of the trial by petitioner in putting in its defense. Any possible relevancy of this mass of evidence was resolved by the jury in favor of respondent. Most of it merely establishes that petitioner was dissatisfied with respondent's services and was an attempted justification of its discharging him, a point which never has been, and is not now, an issue in the case. The five separate slanders of respondent by petitioner, and the two occurrences of false imprisonment of respondent by petitioner occurred on the week end of May 13, to May 16, 1948, a period subsequent to the sixty-day notice of

termination of employment given by petitioner to Dr. Boice on April 30, 1948.

On May 13, 1948, respondent, fearful of malignancy, performed an exploratory laparotomy on Mrs. Hazel Wood. After the abdomen was opened he determined that she had cancer of the uterus and right ovary, and removed the uterus, ovaries and tubes (R 1345, 1347). A subsequent dissection of the uterus disclosed a fetus of the age of three months or less (R 1388).

This operation is the excuse offered by petitioner for its subsequent outrageous conduct and malicious persecution of respondent and his family, and even now it is the attempted justification thereof by petitioner, and even by Judge Pope in his dissent. Both of them carefully overlooked the fact that Mrs. Wood had been very ill for a long time previous to the operation (R 2133), and that following the operation she gained weight and strength and was in excellent health (R 2137).

Miss Jeanne Morton, a hospital nurse, went to the company officials Friday morning May 14, 1948, and made her hysterical denunciations of Dr. Boice (R 1525).

Although Miss Morton had been employed at Stibnite for only about two weeks, these officials, without any investigation of her astounding charges, accepted her word and put into execution their scheme to hound respondent and his family out of town (R 514, 1615, 1634, 1651, 1814), characterized by Judge Pope in his dissent as "this unnecessarily harsh method of putting pressure upon him to leave."

Petitioner summoned to Stibnite Mr. Vern Harris and Dr. Thurston of the hospital advisory board, flying them in by its airplane. These officials told petitioner that they had no jurisdiction in such matters (R 511, 1528, 1533, 1534, 1614), but nevertheless they, at the insistance of petitioner, went to the hospital to interview Dr. Boice. It was during this conversation that Mr. Harold Bailey, petitioner's mine superintendent, in the presence of others, accused Dr. Boice as follows: "You committed an illegal abortion yesterday and I have seen the evidence and you better get out of town if you know what is good for you." (R 146, 147, 450, 518). Later in the conversation Mr. Bailey stated of respondent, "you are insane now and you were before you came to Stibnite, and Miss Morton thinks so too." (R 152, 241, 242). Likewise Bailey told respondent that if he didn't get out of town immediately they would tie him up and fly him out in an airplane (R 149).

The following morning, May 15, 1948, John Bradley, petitioner's vice-president in charge of Idaho operations, arrived in Stibnite and ordered petitioner out of town by sunset. When respondent asked what would happen to his possessions Bradley stated: "I don't give a damn, I am not responsible for that. This is a furnished apartment; put everything you can in a suitcase and get out." Bradley then ordered Jerry Logue, an armed guard of petitioner, to search respondent's apartment. As he left respondent's apartment, Bradley ordered respondent to remain in the apartment, and immediately thereafter armed guards were posted around the apartment where they remained from noon

that day until about seven o'clock that evening (R 153-157, 244-248, 1536-1538).

These armed guards, on the instruction of petitioner, imprisoned respondent in his apartment the remainder of that day (R 157-159, 165, 167, 172, 177, 193, 208, 241, 245, 252, 253, 260, 360, 1233, 1247, 1297, 1442, 1478, 1496, 2093, 2110, 2125).

That same afternoon Ben Mahoney, petitioner's personnel manager, called Mr. Frank Bussy, Mrs. Boice's father, in Texas, and stated to him "That Dr. Boice was a mental case" (R 340).

Petitioner's officials called Mr. Mossman, sheriff of Valley County, and Mr. C. Ben Martin, the county prosecuting attorney, long distance and, in spite of being told that it was not a matter for them in their official capacity, summoned them to Stibnite, transporting them in petitioner's plane (R 1305). Mr. Martin threatened to put Dr. Boice in the state insane asylum if Mrs. Boice did not cooperate with him to obtain a voluntary commitment of respondent, and further threatened to throw both Dr. and Mrs. Boice in jail (R 257, 258).

At the termination of the conversation Mr. Martin told respondent that he would not arrest him if he promised to leave Stibnite with his family the following day to which respondent finally agreed (R 159-161, 262-267). The next morning, Sunday, May 16, 1948, Mrs. Boice asked Mr. Bradley if they could have one additional day because all three of their children were sick. This request Bradley refused, saying that they

would get out of town if they knew what was good for them (R 267-269).

Petitioner had previously cut respondent's telephone lines (R 175, 323, 1325, 1489, 1548, 1646, 1739) and had in addition given instructions that the Boices could not receive or make any telephone calls (R 250 310, 311); thus effectively preventing any contact by respondent with the outside world and enclosing him within the confines of a hostile mining town.

On this Sunday petitioner flew Dr. Charles R. Lowe, a purported psychiatrist and Oscar W. Worthwine, its attorney, into Stibnite (R 1545). Dr. Lowe attempted to coerce Mrs. Boice into assisting in committing respondent to an insane asylum, and, upon her refusal, Mr. Bradley stated concerning respondent "He is bound to be crazy; go and get him" (R 270, 273).

Respondent finished packing their goods and started out of Stibnite about 10:30 on the night of May 16, 1948 with their three children, who, as well as Mrs. Boice, were ill (R 169). The roads were almost impassable and respondent was one of the worst drivers in Stibnite, as the petitioner knew (R 170, 173, 276, 1470, 1739). As they left Stibnite under the cumulative threats of petitioner, they were followed for several miles by petitioner's armed guards (R 171, 172, 277, 278, 362, 1426, 2125).

Respondent got stuck in a mud hole where they remained for about two hours until finally pulled out (R 173, 279). They then continued to a ranch where they remained for about a week until the roads opened sufficiently to continue on to civilization. Respondent

went out alone from the ranch because of the dangerous roads and it was not until about ten days later that he could return for his family (R 174, 270).

In May, 1948, after Respondent had left Stibnite Mr. Mahoney made the slanderous statement that "Dr. Boice was mentally incompetent and that he had to be held under guard so as not to harm the hospital patients and kept from shooting up the town" (R 346, 347).

Petitioner's whole course of conduct toward respondent is characterized by the amazingly arrogant statement of Mr. John Bradley, when he replied in answer to respondent's inquiry as to Bradley's authority to run him out of town, "I am the law" (R 154, 246). This assumption of dictatorial authority by Bradley was confirmed by C. Ben Martin, the Valley County prosecuting attorney. When respondent appealed to this county official for assistance, Martin informed him that Bradley certainly was the law in Valley County (R 159).

It is interesting to note that in making its statement of the facts in its petition for a writ of certiorari, the petitioner instead of referring to the record quotes at great length from the dissenting opinion of Judge Pope. Not only is this recitation merely Judge Pope's view of the facts, but it is also apparent that the judge's statement of the facts is lifted largely from petitioner's factual conception of the case as stated in its brief before the Court of Appeals. Thus it is natural that most of the record proving the respondent's case, the veracity of which has been established by the verdict of the jury, has been overlooked, and an obvious effort

made to emphasize only such testimony as is favorable to petitioner. For instance, both petitioner and Judge Pope stress the statement of Jeanne Morton that there was another woman (Mrs. Denney) in the Stibnite hospital awaiting an operation similar to that performed upon Mrs. Wood. Both conveniently overlook the subsequent admission of Miss Morton that no operation on Mrs. Denney was scheduled or contemplated and that she was in the hospital merely for observation (R 1102).

Again, petitioner and Judge Pope emphasize that the fetus removed from Mrs. Wood was "secreted" by respondent. No mention is made by them that an opportunity was given Dr. Thurston at the hospital to examine the fetus and that he refused (R 1624).

ARGUMENT

A. *Clarification of Issues*

As has been heretofore pointed out, there are only two questions presented by petitioner in its petition for writ of certiorari, i.e., the correctness of the determination by the trial court that the verdict was not motivated by passion or prejudice, and whether or not the trial court properly understood his functions in denying the motion for a new trial. The Court of Appeals for the Ninth Circuit not only affirmed the judgment in its initial opinion, but likewise denied the petition for rehearing en banc. Therefore, under 28 U.S.C.A. Section 46 at least a majority of all the judges

of the Ninth Circuit have determined that the judgment of the trial court was not in error. That these issues may be clarified and clearly understood, it is felt advisable to point out to this court that no contention is made by petitioner that the verdict of $60,000.00 is, in and of itself, excessive; nor is it urged that the evidence is insufficient to support the verdict; likewise petitioner does not assert that there was any abuse of discretion by the trial court in denying the motion for a new trial.

B. *There Are No Reasons for Granting the Writ*

It is the position of respondent that the petitioner has not, in its petition, raised any questions involving considerations of general public concern, or in which any vital public interest appears. The principal contention of petitioner seems to be that respondent's counsel through a planned and consistent appeal to the passion and prejudice of the jury, overstepped the bounds of proper cross-examination. It is submitted that a determination of this question would involve this court in a critical appraisal and evaluation of a record involving 2,227 pages, reporting a trial of almost six weeks in duration. Of necessity, this record would have to be scrutinized, together with all the favorable inferences that could be drawn therefrom in favor of the respondent. It would appear that petitioner, instead of presenting a showing of matters which are inflicted with the public interest, has merely demonstrated that this case is of importance only to the litigants involved. In desperation, petitioner asks

this court for one more forum in which to gain an additional hearing on the merits of the case.

It is counsel's understanding that this court will not issue its writ, merely to review facts, weigh evidence, or determine the inferences to be drawn therefrom.

We respectfully suggest that every conceivable question, including those raised herein by petitioner, have been raised by it on three separate occasions, and on each occasion, after a full, fair and complete hearing the questions have been resolved adversely to the petitioner and in favor of the respondent.

Initially, after the verdict of the jury, the trial judge denied petitioner's motion for a new trial on August 12, 1950, the motion having been filed on October 7, 1949. Prior to its ruling on the motion for a new trial the trial judge had before him the complete transcript of the testimony in the case, and extensive briefs of both sides. His was a considered opinion.

Again the Circuit Court, after full briefing and argument denied the appeal of the petitioner, and the petition for rehearing en banc was also denied. Petitioner throughout these separate procedures, maintained that an excessive verdict resulted from the passion and prejudice inspired in the jury by the tactics on cross-examination of respondent's counsel. In each instance the trial judge and the Circuit Court made a specific finding that the verdict was not induced by passion and prejudice, the trial judge finding:

> "The court is convinced that the jury was not actuated by passion, prejudice or partiality but that the jury acted in good faith and that the verdict was the result of the cool and dispassionate discretion of the jury." (R 124).

In its request for a writ petitioner has not met the test laid down in *General Talking Pictures v. The Western Electric Co.*, 304 U.S. 175, at page 178:

> "There is nothing in the lower court's decision or either of the added questions to warrant recovery here. * * * Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. (Cits.) Moreover the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support (Cits.) There is evidence to support them. Nor would the writ be granted to review questions of anticipation and invention that petitioner argues."

The reasons for granting the writ presented by petitioner obviously fall short of the requirements set out by Justice Frankfurter's concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53 at page 66:

> "Considering the volume and complexity of cases, which obviously call for a decision by this court, and considering the time and thought that the proper disposition of such cases demands, I

> do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. The division in this court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances."

This court has determined that it will not review conflicting evidence, or reverse a Court of Appeals, merely because "were we in its place we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way." *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498.

See also *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508; *Layne v. Western Well Works*, 261 U.S. 387; *Forsyth v. Hammond*, 166 U.S. 506.

The Court's attention is invited to the following cases in which certiorari was denied, the question there being raised of the misconduct of counsel in argument before the jury in each instance: *Fidelity Phoenix Fire Insurance Co. v. Vallone*, 74 F. (2d) 137 (Circ. 5), certiorari denied, 294 U.S. 727; *Silkworth v. U.S.* 10 F. (2d) 711, (Circ. 2), certiorari denied, 271 U.S. 664; *Parmagini v. U.S.* 42 F. (2d) 721, (Circ. 9) certiorari denied, 283 U.S. 818.

C. *The Verdict Was Not Motivated By Passion or Prejudice*

Restating the basic question raised by petitioner, it is maintained that counsel for respondent have "with impunity," indulged in a planned and consistent appeal to the passion and prejudice of the jury, which appeal resulted in a grossly excessive verdict. An analysis of this question discloses first, that petitioner's counsel have ingeniously assumed that counsel for respondent indulged in "a planned and consistent scheme of appeal to passion and prejudice." The record does not bear out this assumption. Secondly, for the purpose of their petition here presented, counsel have indulged in another gratuitous assumption—that the verdict of the jury was grossly excessive. Both the trial court and the Circuit Court have determined these questions after complete review of the record and have found that the verdict was not excessive nor was it the result of passion or prejudice.

The assumptions and intimations of counsel for petitioner cannot be taken by this court in lieu of facts which do not appear in, nor are borne out by the record. *Hussman v. Durham*, 165 U.S. 144.

By indirection, petitioner has raised the question that the verdict in this case was excessive. The consideration of whether or not a verdict was excessive, where the question was properly raised before and determined by the trial court on motion for new trial, should not be re-examined by this Court. See *Southern Railway Co. v. Bennet*, 233 U.S. 80; *Herencia v. Guzman*, 219 U.S. 44; *St. Louis I.N. & S.R. Co. v. Craft*,

237 U.S. 648; *Louisville & N.R. Co. v. Holloway*, 246 U.S. 525; *Chicago & N.W. Ry. Co. v. Kelly*, 74 F. (2d) 31 (Circ. 8); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474; *Wilson v. Everett*, 139 U.S. 616.

The case of *New York Central R. Co. v. Johnson*, 279 U.S. 310, cited by petitioner, is no authority for granting the writ in the case at bar. In the first place the facts are totally and completely at variance. In the second place, each case must be examined in the light of its own facts. Likewise *Minn. etc. R.R. Co. v. Moquin*, 283 U.S. 520, relied on by petitioner is not in point. There this court held that where the Supreme Court of Minn. determined that a verdict for plaintiff under the Federal Employers Liability Act was excessive because of passion and prejudice a new trial must be granted and merely remitting a portion of the verdict was error.

No hard or fast rule is laid down applicable to all cases. In this regard, this court in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, in speaking of the closing remarks of counsel, complained of by the petitioner therein, stated:

> "They were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during the long trial that they

would not appraise the evidence objectively and dispassionately." * * *

"Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice."

Petitioner contends that the jury was influenced by passion and prejudice in rendering its verdict, but it does not maintain that the amount of the verdict, in and of itself, is excessive. It is felt desirable to point out to this court that the verdict was clearly justified by the evidence, and consequently could only be the result of a cool, fair and impartial determination by the jury, as was found by the trial court.

There are two causes of action, both of which were resolved by the jury in favor of respondent. The first was for five separate slanderous statements made by petitioner's officials, in which a young doctor, with an excellent Army record, was publicly accused not only of committing an illegal abortion but also of being insane. The second cause of action was for two separate false imprisonments of respondent by petitioner; the first when petitioner's armed guards confined him in his apartment for many hours on May 15, 1948; the

second occurred when he and his family were hounded and driven out of the town of Stibnite by the threats and persecution of petitioner, on which journey they were accompanied by petitioner's armed guards.

See Griffin v. Clark, 55 Ida. 364, 42 Pac. (2d) 297 (1935)

It cannot be questioned but that a young physician, of good character and reputation, on the threshold of his professional life, would be seriously and materially damaged by the malicious slanders uttered against him, and by his false imprisonment by petitioner. Thus, a substantial award of general damages by the jury was clearly their duty and obligation in the administration of justice.

Also, punitive damages were prayed for in the complaint on both causes of action, and it is readily apparent from the record that the evil, wanton and malicious acts of petitioner in its serious violation of respondent's rights required an award of exemplary damages. Some of the acts of petitioner should be indicated which establish malice in fact.

1. The general circumstances surrounding petitioner's activities on the weekend in question are pertinent to disclose the malicious intent of petitioner to inflict injury on respondent.

Liquid Veneer Corp. v. Smuckler, 90 F. (2d) 196, (Circ. 9).

33 Am. Jur., Libel and Slander, Sec. 267.

53 CJS, Libel and Slander, Sec. 213.

Thus, the planned and deliberate course of action on the part of petitioner to force respondent and his family out of town by threats of imprisonment of both Doctor and Mrs. Boice, and the threats to confine Dr. Boice in an insane asylum, forms a basic pattern of petitioner's activities. State and county officials were flown to Stibnite in petitioner's airplane, none of whom had any authority or jurisdiction over respondent, to exert pressure upon him. Respondent's telephone lines were cut, and neither he nor his wife were permitted to make or receive any telephone calls. When Bradley gave respondent his final checks he forced him to sign a receipt without reading it (R 167). Although Mrs. Boice and all three of their children were ill, the Boice's were forced to drive out of Stibnite in a storm late at night over almost impassable roads, when petitioner knew that respondent was a very poor driver. Bradley vindictively refused the entreaties of Mrs. Boice to allow them one more day in which to leave.

2. Petitioner's failure to make any investigation of the outrageous and incredulous accusations of Jeanne Morton, a newcomer to the mining camp, shows that Petitioner was not acting in good faith, and had no concern for the truth of her charges. This is strong evidence that the petitioner acted maliciously.

Tribune Assn. v. Follwell, 107 F. 646, (Circ. 2).

Morning Union Co. v. Butler, 151 F. 188, (Circ. 2).

Nevada State Journal Publ. Co. v. Henderson, 294 F. 60, (Circ. 9).

Interstate Transit Lines v. Crane, 100 F. (2d) 857, (Circ. 10).

33 Am. Jur., Libel and Slander, Sec. 267.

3. The illwill, hostility and threats of petitioner must be considered by the jury, and will support a finding of malice in fact and award of punitive damages.

McCown v. Bowne, 154 F. (2d) 19, (D.C. App.).

Kroger Grocery & Baking Co. v. Yount, 66 F. (2d) 700, (Circ. 8).

33 Am. Jur., Libel and Slander, Sec. 267.

53 CJS, Libel and Slander, Sec. 213.

There are great numbers of examples of the threats and hostility of petitioner in the record:

(a) Bailey told respondent that if he did not leave town that day he would tie him up and fly him out. (R 149, 241, 284, 450, 1533, 1623).

(b) Bradley ordered respondent to leave Stibnite before sunset. (R 154).

(c) Bradley told respondent that he did not give a damn what happened to respondent's family possessions (R 155, 245).

(d) Martin, Valley County prosecuting attorney, threatened both respondent and his wife with jail (R 159, 160, 258, 262, 263, 265).

(e) To eliminate the possibility of respondent obtaining aid from the outside world, petitioner cut respondent's telephone wire and refused him and his

wife access to telephone service (R 175, 250, 310, 311, 323, 1325, 1489, 1548, 1646, 1739).

(f) Again, Martin threatened to commit respondent to an insane asylum unless he did as petitioner ordered (R 257).

(g) When Mrs. Boice appealed to Bradley for one additional day, he told her to get out of town if they knew what was good for them (R 269).

(h) Dr. Charles Lowe, an agent of petitioner, threatened to commit respondent to an insane asylum, (R 271); that this threat was motivated solely by malice is apparent, as at that time respondent was then in the process of packing preparatory to leaving.

(i) Mahoney, petitioner's personnel manager, told Mrs. Boice he would not "bury the hatchet," and that sooner or later respondent would make a misstep which would satisfy Mahoney's hostility (R 2077).

(j) Mahoney warned Mr. Bussey, respondent's father-in-law, against respondent bringing any suit against petitioner, saying that it would ruin him professionally (R 344).

(k) Armed guards confined respondent in his apartment (R 1247, 1297, 1442, 1478, 1496, 2110, 2125).

(l) Respondent and his family were trailed by armed guards when they left Stibnite (R 172, 277, 355, 362, 1426, 2125).

(m) Martin warned respondent against seeking any legal redress for petitioner's actions. (R 264).

4. The officials of petitioner denied making the slanderous statements (however, Mr. Mahoney ad-

mitted that Mr. Bradley had done so (R 450)), from which denial the jury may infer actual malice.

Louisiana Oil Co. v. Renno, 173 Miss. 609, 157 So. 705, 98 A.L.R. 1396.

5. Repetition of defamatory statements is a circumstance to be considered by a jury in the determination of malice, and will support a finding to that effect.

Fowlie v. Cruze, 52 Mont. 222, 157 Pac. 958.
33 Am. Jur., Libel and Slander, Sec. 267.
53 CJS, Libel and Slander, Sec. 214.

In addition to the five slanderous statements alleged in the complaint, there were other repetitions thereof by petitioner's officials:

(a) Bailey told Mrs. Boice in the hospital that respondent had committed an illegal abortion, and that he was insane (R 241).

(b) Bailey, Bradley or Mahoney stated that respondent either had a mental disease or was taking dope (R 2088).

(c) After respondent had left Stibnite Mahoney told Mrs. Gubser and Fay Anderson that respondent "was a nitwit doctor and a regular psychopathic" (R 2092).

(d) In the spring of 1949 Bailey made the statement in the recreational hall in Stibnite that respondent was crazy (R 2103).

(e) Speaking of the operation on Mrs. Wood, Mahoney told her husband that respondent had done a

terrible thing, and that he, Mahoney, knew it was unnecessary (R 212).

6. The defamatory statements themselves may justify an inference of the actual malice of the defamer. It is impossible to conceive of any accusations which would be so harmful and prejudicial to a young doctor than the public charges uttered by petitioner's officials that Dr. Boice was insane, and that he had committed an illegal abortion.

Washington and Annapolis Hotel Co. v. Riddle, 171 F. (2d) 732, (D.C. App.)
Massee v. Williams, 207 F. 222 (Circ. 6).
Montgomery Ward & Co. v. Watson, 55 F. (2d) 184, (Circ. 4).
National Cash Register Co. v. Salling, 173 F. 22, (Circ. 9).
Wise v. Brotherhood of Locomotive Firemen & Engineers, 252 F. 961, (Circ. 8).
Ross v. Esquire, Inc., 94 F. (2d) 75, (Circ. 2).
33 Am. Jur., Libel and Slander, Sec. 266.
53 CJS, Libel and Slander, Sec. 213 (b).

7. There is a general principal of law that the absence of good faith of a defamer is conclusive evidence of malice in fact. Bailey, who accused respondent of an illegal abortion, and said that he had seen the evidence, admitted that he had never seen the fetus (R 1624). Although accusing respondent of being insane, Bailey told the jury that he did not in fact believe that Dr. Boice was insane (R 1614, 1655). Likewise, although publicly charging respondent with insanity,

Bradley testified that he did not believe he was insane (R 1945, 1950). As these officials of petitioner stated under oath that they did not think respondent was insane, it is clear as a matter of law that they were motivated solely by malice in making the slanderous statements.

Montgomery Ward & Co. v. Nance, 165 Va. 363, 182 S.E. 264.

Massee v. Williams, Supra.

National Cash Register Co. v. Salling, Supra.

Wise v. Brotherhood of Locomotive Firemen & Engineers, Supra.

3 Am. Law Institute, Restatement of Torts, Sec. 613 (f.).

The trial court instructed the jury both on general and punitive damages in both causes of action, and further that the total damages could not exceed the sum of $150,000.00. The fact that the verdict was for substantially less than one-half of this amount is most substantial support to the determination of the trial court, approved by the Court of Appeals, that the jury was not inflamed by passion and prejudice, and that rather the jury reached its determination by a cool, deliberation and impartial appraisal of the evidence, and a conscientious application of the law as given them by the trial court.

Thus, it is clear that the verdict is supported by the record; that passion and prejudice was in no sense a motivating factor, and the award is neither excessive nor monstrous.

See Affolder v. New York, Chicago and St. Louis Railway Co. 339 U.S. 96.

The principal point urged by petitioner is that some parts of the cross examination of its witnesses by respondent's counsel were improper, and that such asserted misconduct improperly influenced the jury. One or two instances of such impropriety are mentioned by petitioner in its brief, and other claimed examples are set forth in its App. B. Petitioner claims that some questions on cross examination were asked under the guise of "impeachment," apparently meaning thereby that respondent's counsel was attempting to lay a foundation for impeachment by contradictory statements. In practically none of the instances mentioned by petitioner was such a foundation attempted to be laid; instead, the whole purpose was to test the credibility of the witnesses. Petitioner reiterates that this was a "planned course of action" to appeal to passion and prejudice. The trial court, in its careful and deliberate review of this case on the motion for new trial, found as a fact that this was not true; and this finding was approved by the Court of Appeals.

That a reasonable latitude must be given a cross examiner to insure a fair trial is well established by this court in the leading case of *Alford v. U.S.*, 282 U.S. 687, wherein the court said:

> "To find that prejudice can be established only by showing that the cross examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief is to

deny a substantial right and withdraw one of the safeguards essential to a fair trial."

People v. Denton, 78 Cal. App. (2d) 540, 178 Pac. (2d) 524.

Johnson v. Cousins, 110 Colo. 540, 135 Pac. (2d) 1021.

State v. Jones, 62 Ida. 552, 113 Pac. (2d) 1106.

Dickey v. Wagoner, 160 Kan. 216, 160 Pac. (2d) 698.

There are numerous rules, long established and adhered to by the courts, which determine the proper scope of cross examination. It would extend this brief to an unwarranted length to attempt to classify each question on cross examination which petitioner finds objectionable. However, each one of them falls under one or more of the following categories of cross examination; each one of the questions is clearly relevant, and the following rules show that each was competent and proper inquiry:

1. Cross examination is proper to show the hostility, bias or prejudice of the witness.

Furlong v. United States, 10 F. (2d) 492.

State v. Radon, 45 Wyo. 383, 19 Pac. (2d) 177.

Giraney v. Oregon Shortline Railroad Company, 54 Ida. 535, 33 Pac. (2d) 359.

United States v. Glasser, 116 F. (2d) 690 (Circ. 7).

Terminal Transport Company v. Foster, 164 F. (2d) 248 (Circ. 5).

Meeks v. United States, 163 F. (2d) 598 (Circ. 9).

United States v. Cohen, 163 F. (2d) 667 (Circ. 3).

Ingalls Shipbuilding Corp. v. Trehern, 155 F. (2d) 202 (Circ. 5).

State v. Collins, 162 Kan. 34, 174 Pac. (2d) 126.

Scott v. State, 72 Okla. Cr. 305, 115 Pac. (2d) 763.

People v. Payton, 36 Cal. App. (2d) 41, 96 Pac. (2d) 991.

Starks v. State, 67 Okla. Cr. 156, 93 Pac. (2d) 50.

Hartman v. Elias, 41 New Mex. 392, 69 Pac. (2d) 929.

People v. Ilderton, 14 Cal. App. (2) 647, 58 Pac. (2d) 986.

State v. Townsend, 146 Kan. 982, 73 Pac. (2d) 1124.

58 Am. Jur., Witnesses, Secs. 715, 718.

2. Cross examination is proper to show previous contradictory statements, or circumstances which tend to contradict the witness's evidence.

Heard v. United States, 255 F. 829.

State v. Hargraves, 62 Ida. 8, 107 Pac. (2d) 854.

Toplitz v. Hedden, 146 U.S. 252.

United States v. Felden, 136 F. (2d) 394, (Circ. 2).

Kroger Grocery & Baking Co. v. Stewart, 164 F. (2d) 841 (Circ. 8).

Atlantic Greyhound Lines v. Isabelle, 157 F. (2d) 260 (D.C.).

London Guarantee & Accident Company v. Woelfle, 83 F. (2d) 325 (Circ. 8).

Parmagini v. United States, 42 F. (2d) 721 (Circ. 9).

McIntosh v. United States, 1 F. (2d) 427 (Circ. 7).

People v. Cornett, 93 Cal. App. (2d) 744, 209 Pac. (2d) 647.

58 Am. Jur., Witnesses, Sec. 630.

3. A witness may be cross examined to place him in his proper setting.

State v. Jones, 62 Ida. 532, 113 Pac. (2) 1106.

4. A witness may be cross examined in order to modify and explain his testimony.

Malia v. Seeley, 89 Utah 262, 57 Pac. (2d) 357.

5. When a witness testifies to part of a conversation or transaction on direct examination, the whole may be inquired into on cross examination.

People v. Goldstein, 84 Cal. App. (2d) 547, 191 Pac. (2d) 102.

Home Benefit Assn. v. Sargent, 142 U.S. 691.
Crosby v. Emerson, 142 F. 713 (Circ. 3).
In re Bryan's Estate, 82 Utah 390, 25 Pac. (2d) 602.
58 Am. Jur., Witnesses, Secs. 632, 635.

6. Evidence to show the hostility of a witness is competent.

Docherty v. People, 96 Colo. 338, 44 Pac. (2d) 1013.
III Wigmore on Evidence, 3rd Ed., Sec. 948.

As has been previously argued, the record in no wise bears out petitioner's contention that respondent's counsel through planned and vicious cross examination incited the passion and prejudice of the jury. To the contrary, the cross examination is well within the proper limits set therefor. It must be kept in mind that this trial consumed a period of approximately six weeks, during which time petitioner paraded some fifty witnesses across the witness stand, a majority of whom displayed open hostility to the respondent. Examining this case in the light of its own facts it will readily appear that the verdict was not the result of passion and prejudice, nor was it excessive.

As a further argument, it is a well defined principal that an order overruling a motion for new trial on error of fact is not reviewable on appeal. This court in *Fairmount Glass Works v. Cub Fork Coal Co.*, supra, held:

"First. The rule that this court will not review the action of a Federal Trial Court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals." * * *

"Appellate courts should be slow in imputing to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." * * *

"Third. The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate, and the circuit courts of appeals have generally followed a similar polity."

See also *Luckenbach S. S. Co. v. U.S.* 272 U.S. 533; *Reagan v. Aiken*, 138 U.S. 109; *P.C. & S.L. Ry. Co. v. Heck*, 102 U.S. 58; *Shannon v. Shaffer Oil & Refining Co.*, 51 F. 2d 878 (Circ. 10).

D. *The Trial Court Did Not Misconceive His Functions.*

It is asserted by petitioner that the trial judge, in passing upon the motion for a new trial, misconceived

his functions by failing to exercise his independent judgment on the facts. The petition is completely silent as to what facts petitioner feels the trial court failed to pass upon, but, in the light of petitioner's argument, it may safely be assumed that petitioner intends to question whether the jury was influenced by passion or prejudice in rendering its verdict.

The question of passion and prejudice was raised by petitioner in its motion for a new trial, and elaborately presented in a lengthy and detailed brief filed with the trial court in support of its motion. It should be remembered that the trial court did not rule upon the motion for a new trial until all the evidence had been transcribed and was available to him in typewritten form for his study and deliberation. Therefore, it is apparent that the learned trial judge not only had the great advantage of having observed the witnesses, the jury, and the whole conduct and course of the trial, but also was able to, and did give, thoughtful and serious consideration to the questions presented in the motion for a new trial, aided by a typewritten record and exhaustive briefs, long after the heat of the trial had dissipated.

In the quiet of such an atmosphere this experienced trial judge, aided by these tools, reviewed and deliberated this case and, in the exercise of his discretion, made his ruling that the motion for a new trial should not be granted. The conscientious assumption of his duties and the complete awareness of his legal obligations are thoroughly established by the able opinion of

this judge, to which opinion respondent respectfully commends this court. (Appendix A).

In his opinion the trial court fully reviewed the evidence, keeping always in mind, as petitioner and also Judge Pope had failed to do, that the verdict of the jury resolved disputed questions of fact in favor of respondent. His opinion disclosed that he passed upon the questions of fact raised by the motion for a new trial and determined them. Speaking of the award of damages in the sum of $60,000.00 the trial judge said "There is ample evidence to support a verdict for the plaintiff."

The judge then considered the question raised in the motion for a new trial of whether or not the jury was motivated by passion or prejudice. He passed on this problem as a question of fact, and found as a fact that the verdict was not so influenced. He stated, "The Court is convinced that the jury was not actuated by passion, prejudice or partiality but that the jury acted in good faith and that the verdict was the result of the cool and dispassionate discretion of the jury." This is an exercise by the trial judge of his independent judgment on the facts and a finding by him, upon review of the whole record and his first hand knowledge of all the events of this long trial, that the jury was not influenced by passion or prejudice. *United States v. Socony-Vacuum Oil Co., supra.*

In the face of this opinion petitioner has the temerity now to urge, without particularization, that this judge misconceived his functions. The trial judge had

no misconception of his power or duty in denying the motion for a new trial. He determined the points raised as a question of fact in the exercise of his discretion, and it is readily apparent from the record that the evidence fully justified this verdict. This also was the decision of the Court of Appeals; thus there is no question raised for review by this Court. See *Fairmount Glass Works v. Cub Fork Coal Co., supra.*

Aetna Casualty and Surety Co. v. Yeatts, 122 F. (2d) 350, (Circ. 4).

Such of the cases cited by petitioner in its petition as have any conceivable bearing upon the question of a misconception by a trial court of his functions have no applicability to the case at bar For example in *Felton v. Spiro,* 78 Fed. 576 (Circ. 6), the trial court deliberately denied a motion for a new trial on the ground that he had no power to grant it, and with the express request that the court of appeals pass upon this question. Other cases involved the misunderstanding of the distinction between passing upon a motion for a directed verdict and that of a new trial. See *General American Life Insurance Company v. Central National Bank,* 136 F. 2d 821 (Circ. 6); *Reid v. Maryland Casualty Co.,* 63 F. 2d 10 (Circ. 5); or they involve the construction of a Federal Rule of Civil Procedure (*Montgomery Ward and Co. v. Duncan,* 311 U.S. 243) or of an amendment to the Constitution (*Capital Traction Co. v. Hoff,* 174 U.S. 1.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Dated April 16, 1952.

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CLARK, District Judge.

OPINION

This was an action for false imprisonment and slander. The plaintiff, Edward H. Boice, was a doctor living with his wife and children at Stibnite, Idaho, where he had resided since March, 1947, occupying an apartment provided as an incident of his employment by the defendant Bradley Mining Company. He held the position of company doctor and manager of the company hospital.

Dr. Boice was raised in Texas, and was graduated from the University of Texas Medical School in 1942, having taken his pre-medical work at Rice University, Houston, Texas. Following his graduation from medical school, he took a one-year rotating internship, covering all branches of medicine, at Jefferson Davis Hospital. Subsequently, he had offered to go into practice in Houston and offers to take further hospital residency work at Jefferson Davis Hospital and Santa Fe Hospital. He had been licensed to practice medicine in Texas. Instead of accepting any of the offers, he voluntarily entered the Army of the United States, going on active duty on July 12, 1943, at Ellington Field, Texas, with the rank of first lieutenant. From there he went to Carlyle Base in Pennsylvania for training, then to Jefferson Barracks, St. Louis, Missouri, where he served a residency in surgery in the Army. Jefferson Barracks was a basic training camp with a large hospital. After about ten months there, he was transferred to Sioux Falls Army Air Base, in South Dakota, where he was engaged in both surgery and general medicine. He remained there a year and a half. From there he went to Orlando, Florida for a couple of months, then to Truax Field, Wiscousin, for a couple of weeks; then to Harlington Air Base, Harlington, Texas. The war was over and the bases were closing down. He was separated from the service on October 19, 1946, with the rank of major.

Following his separation from the Army it was necessary for him to find a location to practice his profession. He took a trip through the Northwest with the idea of settling in this area. He made various inquiries throughout the Northwest as to openings for doctors and wrote to medical associations in

California, Oregon and Washington concerning opportunities. He returned to Texas and had about decided to settle down in Houston and practice his profession there. He had begun negotiations for buying a home there, as well as office equipment. During this time, in December, 1946, he received communications from defendant Bradley Mining Company by telephone and by letter, and was asked if he would come out and discuss the position at Stibnite. In January, 1947, he came to Boise, where he was met by an executive of the Bradley Mining Company, and they proceeded to Stibnite so that Dr. Boise could look over the facilities there and learn the details of the position. He entered into a contract with defendant Bradley Mining Company at that time to operate the defendant's hospital and practice medicine in Stibnite. He then went back to Texas for his possessions and family, and returned to Stibnite with his family on the first of March, the beginning date of his contract. Meanwhile he had obtained his license to practice medicine in Idaho.

Plaintiff testified in substance that on May 14, 1948, he was handed a letter of dismissal by executives of defendant Bradley Mining Company, that he was ordered to go to his apartment and stay there, and that the company placed armed guards around his apartment and kept them on constant watch for three days, or the better part of three days, to prevent him from leaving; also that he was ordered not to see his patients and not to enter the hospital. This was a matter of common knowledge throughout Stibnite. He testified further that certain defamatory remarks were made to and concerning him, in the presence of unprivileged persons, by executives of defendant company. Plaintiff's wife, Catherine Boice, similarly testified to the placing of armed guards around the apartment, as well as to certain defamatory remarks made concerning plaintiff. Specifically, the slanderous remarks charged were to the effect that plaintiff was crazy; that he was insane before he went to Stibnite and still was; that he was a mental case; that he was insane and had to be kept under guard to keep him from harming his patients and shooting up the town; and that he had committed an illegal abortion.

Both plaintiff and his wife testified that they were compelled, against their will and while their children were ill, to leave Stibnite late at night on the 16th of May, 1948, and to

drive their car over the impassable road toward Cascade; that they were followed out of town by the deputy sheriff's car; and that the roads were in such a condition that they were delayed for two hours and eventually got to a dude ranch down the road, where they all stayed for about a week before Dr. Boice undertook to drive on to Cascade, leaving his wife and three infant children, aged one, two and four years, at the dude ranch; and that it was some time later before Dr. Boice could return to the dude ranch and remove his family to Cascade and on in to Boise.

There was evidence that defendant company's switchboard operator was instructed by an executive of defendant company on May 15 not to take any more telephone calls for the Boices and that plaintiff's telephone was cut off in his apartment. While damages for this treatment were not prayed for, it was competent in support of the allegation of malice.

The testimony of plaintiff and his wife relative to some of the slanderous statements and relative to the armed guards stationed around plaintiff's apartment was corroborated by other competent witnesses. The defendant offered evidence that was in direct conflict with the testimony offered by the plaintiff. It denied the false imprisonment, and as to this phase of the case the defendant's evidence was to the effect that guards were placed in the hospital (adjacent to the doctor's apartment) only for the purpose of keeping the doctor out of the hospital and not for the purpose of keeping him in the apartment as alleged in the complaint.

As to the slanderous statements alleged, the defendants offered testimony in an attempt to show that no slanderous statements were made; also some testimony tending to show that if such statements were made they were within the rule of privilege; and there was also some evidence to the effect that if such statements were made and were slanderous they were true.

As to the allegation that the officers of the Bradley Mining Company had made statements to the effect that the doctor had committed an abortion or an illegal abortion, a great deal of evidence was introduced, a number of nurses from the hospital testifying to being in attendance at an operation performed on a Mrs. Wood—specifically, a hysterectomy—during the performance of which a live baby of approximately six

months was taken and placed in a sponge basin, where it kicked for some minutes. This particular testimony was denied, on rebuttal, by one nurse who was in attendance at the operation. Mrs. Wood was called, in rebuttal, and testified that she had five children, that within a short time after conception in each instance she knew that she was pregnant; also that at the time she entered the hospital for the hysterectomy she had no knowledge of any pregnancy.

A great many witnesses were called by the defendant who testified to actions on the part of the doctor to substantiate the statements that the doctor was insane.

It was the privilege and the duty of the jury to evaluate the testimony, and it is manifest from the verdict that the jury believed the testimony of the witnesses for plaintiff, or at least believed a substantial part of it. It is evident that the jury determined that the slanderous charges were not true.

The jury was instructed that plaintiff had alleged false imprisonment and five separate slanderous statements by the defendants and that it was not necessary, in order to find in favor of the plaintiff, that all of those matters be proved by a preponderance of the evidence but that it was sufficient if they should find any one or more of the allegations to have been so proven. There is much conflicting testimony. However, it was solely for the jury to determine what testimony to believe, as quoted with approval by the Supreme Court of Idaho in the case of Summerfield v. Pringle, 144 Pac. (2) 214. The Court cannot determine from the verdict, of course, the precise allegations which the jury found to be proved by the evidence.

The jury was instructed that exemplary or punitive damages could be awarded if it first found that actual damages had been sustained or suffered by plaintiff, and further instructed that exemplary or punitive damages in addition to the actual or compensatory damages could be allowed if it found that the false imprisonment, of any, was wanton, malicious or gross and outrageous, or the facts such as to imply malice and oppression. As to punitive damages in addition to compensatory damages for the alleged slander, the jury was instructed that such could be allowed if it believed from the evidence that the defendants were prompted by actual malice in making the defamatory statements, and that the law presumes or

infers that such statements were made maliciously, if made at all, because they are slanderous on their face, and that inasmuch as defendants had, during the trial, denied making the slanderous statements, such denial could be considered in determining whether or not there was actual malice on the part of defendants if it was determined from the evidence that the statements were in fact made by defendants. There can be no doubt that the jury found that the defendant Bradley Mining Company acted maliciously. The jury was instructed that plaintiff could not claim damages for acts of his own, or for the publicity given to the matter by bringing this action.

Subject to the above and other detailed instructions on the law governing damages, the only restraint placed on the jury by the Court's instructions with respect to the amount of damages that could be awarded was that the amount could in no event exceed the amounts prayed for in the two causes of action set forth in the complaint, to wit, $150,000.00.

The jury awarded the plaintiff $60,000.00 damages against the defendant Bradley Mining Company, and the case is now before the Court on the defendant's motion for a new trial, the motion being based on the ground that the jury did not follow the instructions of the Court, that the evidence did not support the verdict, and that the verdict is excessive. There were no objections made by the defendants to the instructions nor was there any motion made to reduce the amount prayed for as being excessive, prior to the submission of the case to the jury and entry of judgment on the verdict. The Court must assume that the jury followed all of the instructions of the Court. There is ample evidence to support a verdict for the plaintiff.

This leaves only for the Court the consideration of the question of excessive damages. As a broad general rule, the damages must be reasonable whether merely actual damages or actual and exemplary damages. Unless the amount is so unconscionable as to impress the Court with the injustice of the award, and thereby induce the Court to believe that the jury was actuated by passion, prejudice or partiality, there will usually be no interference with the jury's verdict. At the very threshold of this inquiry it must be remembered that the Constitution of the United States and of this State, as well as all other states, has secured the right of trial by jury

in civil actions by the words, "shall be preserved" or, as stated in the Constitution of the State of Idaho, "shall remain inviolate." If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before this Court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the Court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury.

The Court is convinced that the jury was not actuated by passion, prejudice or partiality but that the jury acted in good faith and that the verdict was the result of cool and dispassionate discretion of the jury. The question of excessiveness is primarily addressed to the discretion of the trial court with the constitutional provision above referred to in mind, each case being considered on its own facts. While the amount awarded as exemplary damages is not dependent on the amount of the general or actual damages, still it must be reasonable.

There is no scale nor definite standard by which the damages from slander can be ascertained, but the amount must be governed by the circumstances of each particular case and the allowance made by the jury will not be set aside by the courts unless it clearly appears to have been arrived at through passion or prejudice. The law does not prescribe a definite rule for the ascertainment of the exact amount of damages recoverable for false imprisonment, such question being primarily one for the determination of the jury. In fixing the amount of the award, the jury is justified in exercising a liberal discretion, taking into consideration all the items for which damages may properly be awarded.

Beyond the broad general rule just mentioned, there are special considerations singularly applicable to the case at bar. According to the great weight of authority, defendant's pecuniary ability may be considered in fixing the amount of punitive or exemplary damages. There was ample evidence in this case from which the jury could have inferred, and must almost certainly have inferred, that the defendant Bradley Mining Company was a wealthy company. There is also authority that the status of plaintiff may be considered in fixing the amount of the award. In this case, plaintiff was a young professional

man who was endeavoring to get a start. He had not established an enviable reputation in his profession for he had been practicing only a short time. The jury doubtless took into consideration the fact that the abuses were more likely to injure him than if he had been practicing his profession for many years and had already established a good reputation and following as a physician. Behrendt v. Times-Mirror Company (Calif.), 85 Pac (2) 949.

There is still another consideration which is obvious as it is important, and that is that radical changes have taken place in recent years affecting potential earnings and the cost of living. Verdicts might logically be approved today which would have been unhesitatingly set aside as excessive not so long ago.

Juries have a wider discretion in the matter of punitive damages for slander and false imprisonment than in the matter of compensatory damages, and the Court should not substitute its judgment for the judgment of the jury, even though the Court may be entirely dissatisfied with the jury's verdict. The power of the Court in this respect is limited to granting another trial or, which is to the same effect, giving the plaintiff an option to accept a lesser sum than the verdict awards or submits to a new trial. There must be a very careful limitation to the exercise of this power by the Court, lest it result in the exhaustion of the parties. The trial of this case occupied approximately six weeks. Another trial would likely be a heavy burden to place upon the parties litigant and there is no assurance that a new jury would return a different verdict.

It is the opinion of the Court that the jury in this case was very stable, capable, attentive and conscientious. The jury in this case served for a considerable time in this court and the Court was impressed by the quality and fairness of the jury in all cases where different members of this jury served. This being true, the Court is reluctant to interfere with the jury's determination and it is questionable whether Court would be justified in doing so. The verdict is for a large sum, a large portion of which must necessarily be for exemplary damages. It would have been preferable for the Court to have submitted two forms of verdict, one for general damages and one for exemplary damages, so that the Court could be advised in regard to the finding of the jury in arriving at the verdict. The jury was advised as to the limit it could go in assessing

damages against the defendant. For the Court to say to a jury, this you can do, and then when the jury has acted say that it acted wrongly, discredits the Court if the Court on that ground sets aside the verdict.

Counsel for the defendant have moved to set aside this verdict which the Court now has before it and have asked that a new trial be granted. This verdict was the best judgment of twelve jurors, with the judge during the course of the trial directing them as to matters of law emerging from the evidence. "The jury assisting the judge in determining the matter of fact and the judge assisting the jury in determining points of law, a jury trial has the advantage of the judge's observation, attention and assistance in points of law by way of decision and in points of fact by way of direction of the jury." 2 Hale Hist. Com. Law (5th Ed.) 147, 156, cited Capital Traction Company v. Hof, 174 U.S. 1, 14.

The defendants plead and endeavored to prove a double-barreled defense—first, that they had not made the slanderous statements charged, and second, that the statements made as to the doctor's committing an illegal abortion and that he was insane were true. In support of this second defense, the defendants spent several weeks with a large number of expert medical witnesses. The jury no doubt found that the defendant had made the statements and also determined that the statements were not true. The Court instructed the jury, as hereinbefore stated, that inasmuch as defendants had during the trial denied making the slanderous statements, such denial could be considered by the jury in determining whether or not there was actual malice on the part of the defendants if it was determined that the statements were in fact made by the defendants.

The Court is not unmindful that this is a large verdict. However, it must be remembered that no doubt the jury considered the fact that Dr. Boice has, on account of the acts of the defendant, had a poor start in the practice of his profession and has suffered abuses at its hands, and that the amount of damages allowed was the jury's best judgment. This being true, the Court is of the opinion that it would not be justified in interfering with the jury's determination, and an order is filed in harmony with this opinion.

[Endorsed]: Filed August 12, 1950.

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